A

Mepcom Polymer Sdn Bhd v Lee Yoke Ping & Anor

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-67–06 OF 2020
AHMAD MURAD ABDUL AZIZ JC
30 NOVEMBER 2020

C *Civil Procedure — Injunction — Mareva injunction — Plaintiff brought action against first defendant premised on breach of fiduciary duty and fraud — First defendant was plaintiff's employee — Plaintiff filed application for Mareva injunction against defendants — Whether plaintiff had a good arguable case — Whether defendants' assets were within jurisdiction of court — Whether there was risk of assets being dissipated or removed before judgment was satisfied — Courts of Judicature Act 1964, Schedule, para 6 — Rules of Court 2012 O 29*

D

The first defendant was the plaintiff's accounts and human resource manager. The first defendant's job scope, inter alia, was to prepare, calculate and submit the monthly salaries of all the plaintiff's employees to the managing director ('the MD') of the plaintiff for approval before submitting the same to Public Bank Bhd. The problem arose when the MD discovered that the first defendant had been drawing monies and salaries far beyond her actual salary and other entitlements; and the first defendant had also been making false declarations on her salary to the Kumpulan Wang Simpanan Pekerja ('the second defendant'). The plaintiff contended that the first defendant had misappropriated a total sum of RM1,743,440.74 (reduced from the initial sum of RM1,994,709.92 claimed) and consequently, the plaintiff had brought an action against the first defendant premised on breach of fiduciary duty and fraud ('the claim'). Pending the decision on the claim, the plaintiff filed the present application ('encl 3') for a Mareva injunction against the first defendant to prevent her from dealing with or dissipating her assets. The criteria for the granting of Mareva injunction were: (a) the plaintiff had a good arguable case ('the first limb'); (b) the defendants' assets were within the jurisdiction of this court ('the second limb'); and (c) there was a risk of the assets being dissipated or removed before the judgment was satisfied ('the third limb').

E

F

G

H

Held, allowing encl 3 as amended:

I

(1) The plaintiff's affidavit in support showed the discrepancies in the nett sums payable for the salaries and enrolments and the actual sums paid out of the plaintiff's bank accounts. The exhibit in LAP9 provided details of the discrepancies between the actual sums payable for salaries and the sums actually paid out. Even if the accuracy of the figures was being

challenged by the first defendant, the fact that there was a large discrepancy had been proven. The first defendant as the accounts and human resource manager of the plaintiff owed a fiduciary duty to act honestly and with reasonable diligence in the discharge of her duties. She owed a duty not to abuse her position for her personal benefit to the detriment of her employer. Based on the evidence, the plaintiff had established more than an arguable case to satisfy the first limb (see paras 22–24).

(2) In relation to the second limb, the first defendant admitted that she had assets within the jurisdiction of this court, which were monies in her bank account in Public Bank Bhd and the house in Johor Bahru (see para 25).

(3) The first defendant in her affidavit had admitted to performing acts which were clearly illegal on the alleged instructions of the MD of the plaintiff. The first defendant's admission to being complicit in a scheme to defraud and misappropriate monies belonging to the plaintiff was a reflection of her untrustworthy character. The court agreed with the plaintiff that the lack of probity and conduct of the first defendant and the first defendant's admitted dishonesty had given rise to an almost certain risk that the assets would be dissipated (see paras 27–28).

[Bahasa Malaysia summary

Defendan pertama adalah pengurus akaun dan sumber manusia plaintif. Skop tugas defendan pertama, antara lain, adalah untuk menyiapkan, mengira dan menyerahkan gaji bulanan semua pekerja plaintif kepada pengarah urusan ('PU') plaintif untuk mendapatkan kebenaran sebelum menyerahkannya kepada Public Bank Bhd. Masalah timbul apabila PU tersebut mendapati bahawa defendan pertama telah memperoleh wang dan gaji yang jauh melebihi gaji sebenarnya dan kelebihan-kelebihan lain; dan defendan pertama juga telah membuat pernyataan palsu mengenai gajinya kepada Kumpulan Wang Simpanan Pekerja ('defendan kedua'). Plaintif mendakwa bahawa defendan pertama telah menyalahgunakan sejumlah RM1,743,440.74 (dikurangkan dari jumlah awal RM1,994,709.92 yang dituntut) dan akibatnya, plaintif telah memfailkan tuntutan terhadap defendan pertama atas dakwaan melanggar tugas fidusiari dan penipuan ('tuntutan tersebut'). Sementara menunggu keputusan mengenai tuntutan tersebut, plaintif memfailkan permohonan semasa ('lampiran 3') untuk memohon injunksi Mareva terhadap defendan pertama untuk menghalangnya daripada berurusan atau menghilangkan asetnya. Kriteria untuk pemberian injunksi Mareva adalah: (a) plaintif mempunyai kes yang boleh diperdebatkan ('ciri pertama'); (b) aset defendan-defendan berada dalam bidang kuasa mahkamah ini ('ciri kedua'); dan (c) terdapat risiko aset tersebut hilang atau dikeluarkan sebelum penghakiman diputuskan ('ciri ketiga').

Diputuskan, membenarkan lampiran 3 seperti yang dipinda:

(1) Afidavit sokongan plaintif menunjukkan perbezaan dalam jumlah bersih gaji yang perlu dibayar dan pendaftaran dan jumlah sebenar yang dibayar dari akaun bank plaintif. Ekshibit dalam LAP9 memberikan perincian mengenai perbezaan antara jumlah sebenar yang perlu dibayar untuk gaji dan jumlah yang sebenarnya dibayar. Walaupun ketepatan angka tersebut dipersoalkan oleh defendan pertama, fakta bahawa terdapat perbezaan besar telah dibuktikan. Defendan pertama sebagai pengurus akaun dan sumber manusia plaintif mempunyai kewajipan fidusiari untuk bertindak dengan jujur dan bersungguh-sungguh dalam melaksanakan tugasnya. Dia bertanggungjawab untuk tidak menyalahgunakan kedudukannya untuk kepentingan peribadinya sehingga merugikan majikannya. Berdasarkan keterangan, plaintif telah membuktikan lebih dari sekadar kes yang boleh diperdebatkan untuk memenuhi ciri pertama (lihat perenggan 22–24).

(2) Berkaitan dengan ciri kedua, defendan pertama mengakui bahawa dia memiliki aset yang berada dalam bidang kuasa mahkamah ini, iaitu wang dalam akaun banknya di Public Bank Bhd dan rumah di Johor Bahru (lihat perenggan 25).

(3) Defendan pertama dalam afidavitnya telah mengaku melakukan perbuatan yang jelas menyalahi undang-undang yang didakwa atas arahan PU plaintif. Pengakuan defendan pertama bahawa dia terlibat dalam rancangan untuk menipu dan menyalahgunakan wang milik plaintif adalah cerminan wataknya yang tidak boleh dipercayai. Mahkamah bersetuju dengan plaintif bahawa ketiadaan kejujuran dan tindakan daripada defendan pertama dan ketidakjujuran yang diakui oleh defendan pertama telah menimbulkan risiko yang hampir pasti bahawa aset tersebut akan hilang (lihat perenggan 27–28).]

Cases referred to

Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83, CA (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97; [1987] CLJ Rep 50, SC (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors [1985] 2 MLJ 236 (refd)

Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 MLJ 1, CA (refd)

MPI Polyester Industries Sdn Bhd v Eng Koo Kiang & Ors [2011] 8 CLJ 23, HC (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213, CA (refd)

S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)

Legislation referred to

Courts of Judicature Act Schedule
Rules of Court 2012 O 29

Ee Yen Chin (Ee Yen Chin & Co) for the plaintiff.
David Leow (Tng, Liew, David Leow & Co) for the defendant.

Ahmad Murad Abdul Aziz JC:

INTRODUCTION

[1] The application by the plaintiff in encl 3 is for a Mareva injunction against the first defendant to prevent her from dealing with or dissipating her assets pending the decision of this court on the plaintiff's claim against her.

[2] The ex-parte application was first heard by this court on 14 June 2020 and the plaintiff was granted the orders prayed for.

At the inter-parte hearing before me, I adjourned the matter for decision to 18 August 2020. After reading the affidavits by both parties and hearing submissions, I allowed the plaintiff's prayers for the orders in encl 3 with minor amendments.

The first defendant has now appealed against the my decision given on 18 August 2020.

THE FACTS

[3] At the material time, the defendant was the plaintiff's accounts and human resource manager. Her job scope, inter alia, was to prepare, calculate and submit the monthly salaries of all the plaintiff's staffs and employees, to Mr Lim Ah Peng, the managing director ('MD') of the plaintiff for approval before submitting the same to Public Bank Bhd ('the bank'). The bank would then credit the salaries into the employee's respective accounts.

[4] There are three methods in which the plaintiff uses to pay the employees' salaries, which are by way of cash, cheques or bulk payroll payment through the bank. The bulk payroll payment is a method of payment through the bank whereby the bank will do a mass transfer for and on behalf of the plaintiff, wherein monies will be transferred from the plaintiff's bank account to the employees' respective bank accounts. In order for the bulk payroll process to take place, the plaintiff will provide the bank with a letter of instruction/approval together with a table precisely stating the exact figure of how much is to be paid to each individual/employees.

[5] Each month before sending to the bank for the purpose of bulk payroll payment, the first defendant will first prepare a summary table stating the employees' salaries. This table consists of all employees gross salaries, overtime payment, allowances, EPF and SOCSO contribution, income tax deduction as well as the nett salary to be received by all the employees ('the summary table'). This summary table will only be shown to the MD for reference purpose and a different table with only the nett salaries payout will be attached to the bank for the purposes of bulk payroll payment.

[6] At all material times, the first defendant had been entrusted to ensure that the calculation of the employees' salaries are correct and accurate.

[7] In order for the bank to process the bulk payroll payment, the bank only requires a letter of instruction ('letter of instruction') duly signed by the MD attaching a table precisely stating the exact figure to be paid to each employee ('the documents submitted to bank').

[8] Prior to July 2019, the bank did not require the MD's signature on the attached table and the requirement only came after that date. As such, prior to July 2019, the MD only needed to sign off the letter of instruction and the defendant can forward the table subsequently.

[9] The bank after receiving the documents submitted to bank will then proceed to process payment to the respective employees pursuant to the amount given in the attached table.

ALLEGED MISAPPROPRIATION OF FUNDS BY THE FIRST DEFENDANT

[10] Sometime around early April 2020, upon receiving the summary table for the month of March 2020, the MD noticed that the total sum for the employees' nett salaries when added up does not tally with the final figure shown in the summary table. The MD discovered that there was a discrepancy whereby the total sum is much larger than the actual salaries added up together.

[11] Once his suspicion was aroused, the MD decided to review all the summary table for the years prior to 2020. He then discovered that there were discrepancies in the figures for every month going back to the year 2016. The discrepancies grew larger gradually from 2016 to March 2020 (*lampiran* 10 in encl 5).

[12] The MD alleges that the first defendant was uncoorperative when asked to provide the documents in her possessions to verify the figures. The MD then

obtained the figures from the bank. Upon receiving the documents the MD discovered that the first defendant had been drawing monies and salaries far beyond her actual salary and other entitlements (see *lampiran* 9 in encl 5).

The plaintiff alleges that the first defendant had also been making false declarations on her salary to the Kumpulan Wang Simpanan Pekerja ('KWSP') the second defendant herein.

[13] The plaintiff alleges that the first defendant has misappropriated a total sum of RM1,743,440.74 (reduced from the initial sum of RM1,994,709.92 claimed) and has committed a breach of fiduciary duty and fraud on the plaintiff.

THE DEFENDANT'S REPLY

[14] The first defendant in response to the plaintiff's allegation claims that she acted on the alleged instructions of the MD.

The first issue taken up by the first defendant is the discrepancy in the sums allegedly misappropriated by the first defendant. Initially the plaintiff alleges that the first defendant took the sum of RM1,994,709.92, and the ex parte injunction was granted on that sum. Subsequently the amount was reduced to RM1,743,440.74 and the discrepancy indicates that the plaintiff is unsure of the exact sum they are claiming.

[15] The first defendant alleges that the plaintiff is controlled and beneficially owned by one Lim Ah Peng who is the MD and he controls the company although he is not the major shareholder, but the 'alter ego' of the company.

[16] The first defendant alleges that all monies paid into her her account here on the instructions of the MD (see para 13(e) of the first defendant's submission).

[17] The first defendant also alleges that the payments of the monies into her personal accounts were part of a scheme orchestrated by the MD to fund his own personal expenses, to evade tax, and other illegal activities.

[18] The first defendant submits that the plaintiff has failed to provide any evidence that there is a risk of dissipation of her assets based on the fact that she is married with a young child and has assets within the country.

[19] The first defendant submits that main intention of this application is to 'cripple' the first defendant financially.

A THE LAW

[20] The principle governing the granting of a Mareva injunction is well settled.

B The criteria for the granting of a Mareva injunction are:

(a) the plaintiff has a good arguable case;

(b) the defendant's assests are within the jurisdiction of this court; and

C (c) there is a risk of the assets being dissipated or removed before the judgment is satisfied.

The governing principles was first laid down by the case of *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213, and subsequently applied by our courts in numerous cases including:

D (a) *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Osman & Ors* [1985] 2 MLJ 236;

(b) *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97; [1987] CLJ Rep 50; and

E (c) *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62.

Likewise, the jurisdiction of this court to grant a Mareva injuction is well settled and beyond dispute. The power of this court to grant such an injunction F is pursuant to para 6 of the Schedule to the Courts of Judicature Act, read with O 29 of the Rules of Court 2012.

FINDINGS BY THE COURT

G **[21]** The plaintiff first needs to satisfy this court that it has a good arguable case. The plaintiff quoted the case of *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1, where the Court of Appeal explained the concept of a good arguable case:

H > What is a good arguable case is difficult to define. The respondent *need not* show that they have a case so strong as to warrant summary judgment nor even a strong prima facie case. It would generally be sufficient if the respondents can show on evidence available, there is a fair chance that they will obtain judgment against the appellants.

I **[22]** The affidavit in support by the plaintiff in paras 22, 28–38 and exhs LAP5, 6, 7, 8, 9 and 10, collectively shows the discrepancies in the nett sums payable for the salaries and enrolments and the actual sums paid out of the plaintiffs bank accounts. The exhibit in 'LAP9', provides details of the discrepancies between the actual sums payable for salaries and the sums actually

paid out. Even if the accuracy of the figures is being challenged by the first defendant, the fact that there is a large discrepancy has been proven.

[23] The first defendant as the accounts and HR manager of the plaintiff owes a fiduciary duty to act honestly and with reasonable diligence in the discharge of her duties. She owes a duty not to abuse her position for her personal benefit to the detriment of her employer.

In the case of *MPI Polyester Industries Sdn Bhd v Eng Koo Kiang & Ors* [2011] 8 CLJ 23 at p 247, Harminder Singh Dhaliwal JC (as he then was) states:

> According to Clerk & Lindsell on *Torts*, a 'breach of fiduciary duty is a civil cause of action for a failure to meet one of the obligations that, in equity, had created a special relationship of fiduciary and principal between the defendant and the claimant respectively, which, if established, would entitle the claimant to equitable compensation for his loss or to restitution for the fiduciary's unauthorised gain'.

[24] Suffice to say that this court finds on the evidence in the affidavit in support and the exhibits, the plaintiff has established more than an arguable case to satisfy the first limb required for a Mareva injunction.

Added to that, the first defendant did not challenge the discrepancies but merely the accuracy of the amounts up to the sum of approximately RM251,269.

[25] With respect to the second limb, the first defendant admits to having assets within the jurisdiction of this court, which is monies in her bank account in Public Bank Bhd and the house in Johor Bahru.

[26] The last limb which the plaintiff needs to satisfy to allow this court to grant him the Mareva Injunction is the presence of a risk of dissipation or removal of her assets out of jurisdiction by the first defendant before any judgment can be satisfied.

[27] The first defendant in her affidavit has admitted to performing acts which are clearly illegal on the alleged instructions of the MD of the plaintiff.

In para 11 of her *afidavit balasan* she claims to have been complicit in manipulating the accounts of the plaintiff for the purpose of evading taxes and have made payments to the MD for the alleged personal use of the monies by the MD.

Details of the illegal acts performed by her on the alleged instructions by the MD are detailed in paras 13–19 of her *afidavit balasan* dated 31 May 2020. Her allegations of instructions given by the MD are bare allegations without any evidence.

Her admission to being complicit in a scheme to defraud and misappropriate monies belonging to the plaintiff is a reflection of her untrustworthy character.

Her allegation that the acts were committed on the instruction of the MD is irrelevant as it was obviously done willingly with a view of sharing the ill gotten gains.

[28] It is submitted by the plaintiff's counsel, the lack of probity and conduct of the first defendant and her admitted dishonesty has given rise to an almost certain risk that the assets will be dissipated and I am in agreement with the plaintiff's submission on this point.

The court in the case of *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83, p 89 para H-I and p 90 para A-G held as follows:

> Having considered the evidence, *I am of the view that the conduct of the appellant in this matter is lacking in probity and honesty*. In the circumstances, I conclude that *there is a real risk that the assets of the appellant will dissipate should the respondent succeed at the trial*. I feel that I am justified in arriving at this conclusion in the light of the decisions in the following two cases: in *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261, Peh Swee Chin J (as he then was) said at p 264:
>
> > The second condition laid down by Mustill J (in *Ninemia Maritime Corp v Trave SGmbH & Co KG* [1984] 1 All ER 398), duly approved by the Federal Court (in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62), was also satisfied, ie there was solid evidence that the probity of the defendant could not be relied on. The undisputed detention and use of the plaintiff's equipment, without the consent of plaintiff, and above all, the undisputed detention of 98% of progress payments Nos 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned; *in other words, the defendant would, far more probably than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.*

[29] For the reasons aforesaid, I allowed the plaintiff's application in encl 3 as amended.

Enclosure 3 allowed as amended.

Reported by Dzulqarnain bin Ab Fatar